No. 85-5221 (11)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

RANDALL LAMONT GRIFFITH,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

ON WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

BRIEF AMICI CURIAE IN SUPPORT OF THE RESPONDENT BY THE NORTH CAROLINA ATTORNEY GENERAL AND THE 21 AMICI THAT APPEAR ON THE INSIDE COVER

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Utah by David L. Wilkinson, Attorney General
Virginia by Mary Sue Terry, Attorney General
Wyoming by Archie G. McClintock, Attorney General

QUESTION PRESENTED

SHOULD THE HOLDING IN ***BATSON v. KENTUCKY***, 476 U.S. ____ (1986), BE GIVEN RETROACTIVE EFFECT IN CASES PENDING ON DIRECT APPEAL?

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BRIEF OF THE AMICI STATES IN SUPPORT OF RESPONDENT COMMONWEALTH OF KENTUCKY

INTEREST OF THE AMICI CURIAE

The ***amici curiae*** are States which have, in the administration of their systems of justice, relied on the holding in ***Swain v. Alabama*** in regulating the use by the State of the State's peremptory challenges in cases and whose court systems will be seriously disrupted by a retroactive application of ***Batson v. Kentucky***.

STATEMENT OF THE CASE

The ***amici*** States adopt the Statement of Case as set forth by the respondent Commonwealth of Kentucky.

SUMMARY OF THE ARGUMENT

Swain v. Alabama, correctly or incorrectly, was perceived by the State and lower Federal Courts to hold that a prosecutor, without violating the Equal Protection Clause of the Constitution, could, on a case specific basis, challenge blacks or other minorities on the basis of race. ***Batson v. Kentucky*** has prohibited such conduct and has radically changed the evidentiary burden of a defendant in showing an Equal Protection Violation based on the prosecutor's use of peremptory challenges.

Batson v. Kentucky represents a "clear break" with past precedent and therefore, under the threshold test set out in ***United States v. Johnson***, should be given prospective effect only.

If the retroactivity issue is determined by resorting to the three factor test of ***Stovall v. Denno***, the decision of ***Batson*** still should be deemed by this Court to be prospective in effect only. None of the three factors favors holding ***Batson*** retroactive.

In ***Allen v. Hardy*** this Court assumed ***Batson*** had some impact on the truth finding function of the jury. However, even as to capital cases, due to the other safeguards in place in a trial, the decision in ***Batson*** will have no substantial impact on the truth finding function of the jury.

Prosecutors and State Courts relied on the apparent holding in ***Swain*** dealing with both when the Constitution is violated by a prosecutor's conduct and what evidentiary showing must be made to prove an Equal Protection violation. The interpretation of ***Swain*** by the prosecutors that the Equal Protection Clause permitted case specific peremptory challenges based on race is not unreasonable since that view of ***Swain*** was also held by the State and Federal Courts, as well as the legal commentators who reviewed the issue.

Finally, the impact of a retroactive application of ***Batson***, even when limited to cases now pending on direct appeal, will be significant. Due to the changes made by ***Batson*** as to the defendant and prosecutor must show in litigating an Equal Protection violation claim, the vast majority of the cases containing a ***Batson*** issue will have to be remanded for an evidentiary hearing. Since the prosecutor likely will be unable, several years after a ***voir dire***, to explain why he used his peremptories in the manner he did, many new trials must be granted in cases. Victims and witnesses will once more be required to undergo the inconvenience and trauma of testifying. Thus, the impact on the system of justice will be significant. The ***Stovall v. Denno*** test, like the "clear break" threshold rule of ***United States v. Johnson*** mandate that ***Batson v. Kentucky*** not be given retroactive effect for those cases now pending on direct appeal.

ARGUMENT

IN CASES PENDING ON DIRECT APPEAL *BATSON V. KENTUCKY* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

In 1965, in ***Swain v. Alabama***, 380 U.S. 202 (1965), in an opinion written by Justice White, this Court stated in Part II of the opinion that:

> "...we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant

and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature of the operation of the challenge...

In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 380 U.S. at 222.

The Court's holding in Part II of ***Swain*** was subsequently universally viewed by the State and Federal Courts, as well as by legal commentators, as holding that a prosecutor's use of the peremptory challenge in a single case to remove blacks from the venire was not a violation of the Equal Protection Clause of the Constitution. See "***Use Of The Peremptory Challenge***", 79 ALR3d 14, §3, p. 27 (1977). Johnson, ***Black Innocence And The White Juror***, 83 Michigan Law Review 1611 (1985). ("Under ***Swain v. Alabama***, a prosecutor may deliberately use his peremptory challenges to exclude all blacks from a jury trying a black defendant", p. 1614); ***McCray v. New York***, 461 U.S. 961, 964 (1983). ("In ***Swain***, a closely divided Court held that the prosecutor's use of peremptory challenges to strike Negroes from the jury panel in one particular case did not deny the defendant equal protection of the laws.") (Marshall, J. dissenting from denial of certiorari); ***Thompson v. United States***, ___U.S. ____, 105 S.Ct. 443 (1984); ("***Swain*** - whose rule, if without other virtue, was at least clear...") p. 446; (Brennan, J. dissenting from denial of certiorari).

The State Courts which declined to follow ***Swain***, on the basis of State constitutional protections, asserted that ***Swain*** held that a prosecutor could, without violating the Equal Protection Clause, strike a black juror on the basis of his race from the venire in a particular case if that strike was for a trial purpose. ***People v. Wheeler***, 22 Cal.3d 258, 148

Cal. Rptr. 890, 583 P.2d 748 (1978); ***Commonwealth v. Soares***, 377 Mass. 461, 387 N.C.2d 499 (1979); ***State v. Crespin***, 94 N.M. 486, 612 P.2d 716 (N.M. App. 1980). Even after certiorari had been granted in the case of ***Batson v. Kentucky***, ____ U.S. ___, 105 S.Ct. 2111 on April 22, 1985, the Fifth Circuit, en banc, in ***United States v. Leslie***, 783 F.2d 541 (1986) reaffirmed its adherence to ***Swain***. In so doing, the Fifth Circuit stated, "Plainly, the Supreme Court in ***Swain*** held that a prosecutor may peremptorily challenge on racial (or similar group) grounds so long as he does so on 'considerations related to the case he is trying, the particular defendant involved and the particular crime charged' ***Swain***." 783 F.2d at 548.

On April 30, 1986, this Court announced its decision in ***Batson v. Kentucky***, ____U.S.____, 106 S.Ct. 1712 (1986). In this case the majority side stepped the Sixth Amendment issue which was the basis for the grant of certiorari and instead held that it is a violation of the Equal Protection Clause for a prosecutor in a particular case peremptorily to excuse from a jury blacks solely on the basis of race when the defendant is black. The Court specifically stated that to the extent ***Swain*** was inconsistent with ***Batson***, ***Swain*** was overruled. 106 S.Ct. at 1725, n.25.

The ***amici*** represent states whose courts had relied upon ***Swain v. Alabama*** and the continued body of case law which had reaffirmed the validity of ***Swain*** in ruling on equal protection claims based on use of a prosecutor's peremptory challenge and whose prosecutors had relied upon ***Swain*** and its progency in exercising their peremptory challenges in a manner they felt consistent with representing the State in a particular case. ***Batson v. Kentucky***, ***supra*** is now the law and will be scrupulously followed. However, due to the substantial break with past precedent contained in ***Batson***, the ***amici*** assert that ***Batson*** should not be applied retroactively to cases now pending on direct appeal in the State and Federal Courts.

1. UNDER THE "CLEAR BREAK" STANDARD OF *UNITED STATES V. JOHNSON, BATSON* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

As noted in ***State v. Jackson***, ____N.C.____, 343 S.E.2d 814 (1986), "the Supreme Court has not been completely consistent in its approach to the question [of retroactivity]". However, it would appear that as to those cases to which finality[1] has attached the three factors set out in ***Stovall v. Denno***, 388 U.S. 293 (1967) are applied to determine the appropriateness of retroactivity of a new rule of the Court to a case pending in a collateral proceeding. ***See Solem v. Stumes***, 465 U.S. 638 (1984), ***Allen v. Hardy***, _ U.S __, 106 S.Ct. 2878 (1986) (per curiam). In matters not final at the time of the ruling, the approach to retroactivity principles employed in ***United States v. Johnson***, 457 U.S. 538 (1982) and ***Shea v. Louisiana***, ___U.S.___, 105 S.Ct. 1065 (1985) should be applied.

In ***United States v. Johnson***, ***supra***, the court reviewed its prior retroactivity decisions and stated that an analysis of post ***Linkletter***[2] cases established that the answer to retroactivity in three narrow categories of cases was not determined by ***Stovall*** criteria, but rather through the application of a threshold test. If the decision merely applied settled precedents to new and different factual situations, application

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[1]The Court has defined final to mean where judgment of conviction was rendered, availability of appeal exhausted, and time for petition for certiorari had either elapsed or certiorari had been denied before the decision. ***Linkletter v. Walker***, 381 U.S. 618 (1965).

[2]***Linkletter v. Walker***, 381 U.S. 618 (1965). After determining retroactivity was neither required or forbidden by the Constitution, the Court in ***Linkletter***, stated it was necessary to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation to determine whether retroactive application was called for."

of the rule will be retroactive. ***See, for instance: Dunaway v. New York***, 422 U.S. 200 (1979). Also, retroactive effect must be given to a ruling that a trial court lacked the basic authority to convict or punish. ***See Furman v. Georgia***, 408 U.S. 238 (1972). Where, however, the case announces an entirely new and unanticipated principle of law - a clear break with the past - the decision will almost invariably be applied prospectively only. A "clear break" has been recognized only when a decision explicity overrules a past precedent of the Court, or disapproves a practice the Supreme Court arguably had sanctioned in prior cases or overturned a long standing and wide spread practice to which the Court has not spoken, but which a near unanimous body of lower Court authority expressly approved. The precedent upon which this "clear break" rule was fashioned was earlier described as a decision which "constituted a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." ***United States v. Peltier***, 422 U.S. 531, 544 (Brennan, I., dissenting). Likewise, in ***Solem v. Stumes***, 465 U.S. 638 (1984) the Court commented on the concept of "clear break". The Court noted that because ***Edwards v. Arizona***, 451 U.S. 477 (1981) did not "overrule any prior decision or transform standard practice... it [was] not the sort of 'clear break' case that is almost automatically non-retroactive." 465 U.S. at 647.

Under the "clear break" rule set out in ***United States v. Johnson, supra***, (derived from prior precedent of the Court, obliquely recognized in ***Stumes***, and expanded beyond the scope of the Fourth Amendment by ***Shea***), ***Batson***, by its overruling of ***Swain v. Alabama***, is precisely the type of clear break case which should be given prosepctive application only.[3] See: ***Daniel v. Louisiana***, 420 U.S. 31 (1975)

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[3]The State cases which have examined the retroactivity issue in ***Batson*** have generally deemed ***Batson*** to be nonretroactive on the basis of "clear break". ***State v. Jackson, supra***. (***Batson*** is a clear break case since it "explicity rejected to the prior ***Swain*** requirement and unequivocally overruled ***Swain***.)" 343 S.E.2d at 825). ***Bowden v. Kemp***, 256 Ga. 70, 344 S.E.2d 233 (1986). ("The Supreme Court of the United States did

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(Ruling forbidding exclusion of women from juries not to be applied retroactively); ***Gosa v. Mayden***, 413 U.S. 665 (1973), (Ruling granting civilian trials to military personnel accused of non service related crimes not to be applied retroactively), ***De Stefano v. Woods***, 391 U.S. 145 (1968) (Ruling guaranteeing a right to a jury trial in certain cases not to be applied retroactively).

Griffith and his ***amici*** suggest that ***Batson*** cannot be deemed a "clear break" both because it was allegedly foreshadowed by a series of State and Federal cases and because ***Batson*** merely redefines a procedural, evidentiary burden. Such a view of ***Batson*** is untenable. In ***Allen v. Hardy***, a majority of this Court recognized ***Batson*** to be "an explicit and substantial break with prior precedent." 106 S.Ct. at 2879. ***Batson v. Kentucky, supra***, (White, J. concurring).

While ***McCray v. New York***, 461 U.S. 961 (1983) (denial of certiorari) and several state and federal cases certainly suggested that ***Swain*** was becoming the target of criticism, no State or Federal case had, on the basis of federal law, claimed that ***Swain*** no longer controlled how an equal protection claim on the basis of peremptory challenges was to be decided. ***See, for instance Booker v. Jabe***, 775 F.2d 76[illegible] (6th Cir. 1985) remanded ***sub nom Michigan v. Booker***, No. 85-1028 (June 30, 1986); ***People v. Wheeler, supra***. The fact that the overruling of ***Swain*** might have been urged by

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continued from above
not hold ***Batson*** to apply retroactively and we do not view it as being so intended." 344 S.E.2d at 234); ***State v. Wagster***, 489 So.2d 1299 (La. App. 1986). ***State v. Calvin Hawkins***, ___S.C.___, ___S.E.2d ___(June 6, 1986). Likewise, the Fifth Circuit Court of Appeals held ***Batson*** nonretroactive on collateral review in several death penalty cases due to ***Batson's*** substantial departure from prior precedent. ***Smith v. McCotter***, 86-1615, ___F.2d ___(1986), ***stay denied***, ___U.S.___, (August 21, 1986); ***Esquivel v. McCotter***, 791 F.2d 350 (5th Cir.), ***cert. denied***, ___U.S.___, 106 S.Ct. 2294 (1986). ***See also Simpson v. Massachusetts***, 795 F.2d 216 (1st Cir. 1986). Other States are presently litigating the retroactivity issue. ***See People v. Kirk***, 98 Ill, Dec. 64, 493 N.E.2d 1085 (1986). Some others have simply assumed retroactivity without examining the issue. ***People v. Hockett***, 503 N.Y.S.2d 995 (1986); ***Saadig v. State***, 387 N.W.2d 315 (1986).

commentators or lower court dicta does not in any way make ***Batson*** less a "clear break". ***See, e.g. Desist v. United States***, 394 U.S. 244 (1969).

Likewise, Griffin's claim that ***Batson***, being a mere realignment of an evidentiary standard dealing with a known constitutional principle, is not a "clear break" case is meritless. On this logic ***Katz v. United States***, 389 U.S. 347 (1967) being a mere shifting of an evidentiary standard dealing with a known constitutional principle - The Fourth Amendment - would also have required retroactive application. ***See Desist v. United States, supra***. The fact remains, as this Court stated in ***Allen v. Hardy***, "the rule in ***Batson v. Kentucky*** is an explicit and substantial break with past precedent", 106 S.Ct 2880. As such, it is a "clear break" case and under ***United States v. Johnson***, and ***Shea v. Louisiana***, is entitled to prospective application even as to cases presently pending on direct appeal.

2. *STOVALL V. DENNO* CRITERIA ALSO MANDATE PROSPECTIVE APPLICATION OF *BATSON*.

The ***amici*** assert that the principles set out in ***United States v. Johnson*** are the rules by which retroactivity should be determined. However, assuming the ***Stovall v. Denno***[4] three part test is the appropriate measure to use in determining retroactivity instead of the "clear break" analysis in ***United States v. Johnson***, ***Batson*** still requires prospective application.

A. THE PURPOSE TO BE SERVED BY THE NEW STANDARD.

The first prong of the ***Stovall*** criteria examines the purpose for the new standard. Complete retroactive effect is most appropriate where a new constitutional principle is

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[4]Justice Burger, dissenting in ***Batson v. Kentucky***, employed the ***Stovall*** criteria in showing the necessity for prospective application only of ***Batson***.

"designed to avert the clear danger of convicting the innocent." ***Tehan v. Shott***, 382 U.S. 406, 416 (1966). "Where the ***major*** purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that ***substantially*** impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule frequently has been given complete retroactive effect." ***Williams v. United States***, 401 U.S. 646, 653 (1971). (Emphasis added). However, as emphasized, the impairment to truthfinding must be substantial, and not simply incidental to the main basis for the new standard.

Retroactivity is not required by a determination "that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to avoid distortion in the process." ***Gosa v. Mayden***, 413 U.S. at 680.

Batson does have some "bearing on the truth finding function of a criminal trial". ***Allen v. Hardy***, 106 SCt at 2880. This, however, is not the major purpose for the new standard enuciated in ***Batson***. The decision mainly serves other values - strengthing the public confidence in the administration of justice and protecting minority citizens called into jury panels from discrimination by the State. ***Batson v. Kentucky, supra***.

Whether a Constitutional rule of criminal procedure sufficiently enhances the reliability of the truth finding process to require retroactive application is necessarily a matter of degree. ***Johnson v. New Jersey***, 384 U.S. 719 (1966). The cases in which this Court has found such a substantial effect on the accuracy of the truth finding process have generally involved those issues either giving an accused the ability to present his case effectively. [***See Arsenault v. Massachusetts***, 393 U.S. 314 (1969)]; or placing of fundamental burdens of proof on an accused. [***Hankerson v. North Carolina***, 432 U.S. 233 (1977); ***Ivan v. City of New York***, 407 U.S. 203 (1972).] ***Batson*** simply does not deal with an issue which has the type of profound impact on the truth finding function that is present in those cases where this

Court has ordered complete retroactivity such as ***Hankerson***, ***Furman***, or ***Gideon v. Wainwright***, 372 U.S. 335 (1963).

Amici for Griffith point to studies which indicate blacks are more likely to be for the "underdog" and suggest these studies mandate a finding that the truth finding function had been substantially impaired by pre-***Batson*** practice since blacks, allegedly, are more likely to find an accused innocent. The studies relied upon by Griffin are generally over ten years old and are based on suspect methodology. ***See Lockhart v. McCree***, ___U.S.___, 106 S.Ct. 1758 (1986). However, even if the studies are worthy of some consideration, they do not require a finding that peremptory strikes of blacks substantially impair the truth finding process. The studies are no more compelling than the sociological studies presented in the case of ***Taylor v. Louisiana***, 419 U.S. 522 (1975) which caused this Court to conclude, at footnote 12 "...Controlled studies of the performance of women as jurors conducted subsequent to Ballard have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result." 419 U.S. at 532. ***Taylor***, in ***Daniel v. Louisiana***, 420 U.S. 31 (1975) was given prospective application only. In ***Gosa v. Mayden***, ***supra***, this Court refused to hold retroactive the Court's decision granting military personnel the right to a civilian trial with all of the added procedural protections afforded by a civilian trial. In ***De Stefano v. Woods***, 392 U.S. 631 (1968), the Court refused to hold retroactive the right to a jury trial in some cases. This Court also refused to give retroactive effect to its ruling in ***Bloom v. Illinois***, 391 U.S. 194 (1968) which extended the right to jury trials in serious criminal contempt situations. These cases clearly had as much, if not more, impact on the truth finding function of a trial as does the new standard in ***Batson***.

If the right to a civilian jury trial, and the right to have women - 53% of the population - on a jury are not matters substantially impairing the truth finding function, then the peremptory exclusion of one or more minority citizens from a petit jury cannot be so deemed. A defendant is not entitled to a sympathetic jury - only a fair one. ***Lockhart v. McCree***, ***supra***. Nothing presented by Griffith shows the juries selected under pre ***Batson*** procedures were unfair.

The *amici* for Griffith suggest that, notwithstanding other criminal cases, the capital punishment cases mandate that ***Batson*** be made retroactive on cases pending direct appeal because of the "unacceptable risk...infecting the ***capital sentencing proceeding***... ***Turner v. Murray***, 476 U.S. , 90 L.Ed.2d 27, that results from the exclusion of minorities from capital juries." Brief of Amici, NAACP Legal Defense Fund and American Jewish Congress, p.33. However, while a sentencing jury does make a "highly subjective, unique, individualized judgment regarding punishment that a particular person deserves", ***Caldwell v. Mississippi***, 472 U.S. n.7, 105 S.Ct. 2633, 2645-46 n.7 (1985); ***Turner v. Murray***, 476 U.S. , 106 S.Ct. 1683, 1687 (1986), this does not raise an unacceptable risk that a ***Batson*** violation will have a substantial impact on the sentence imposed.

In ***Allen v. Hardy*** this Court acknowledged the rule in ***Batson*** "may have some bearing on the truth finding function of a criminal trial." 106 SCt. 2880. The question, however of "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process is necessarily a matter of degree..." ***Johnson v. New Jersey***, 384 U.S. 719, 728 (1966). This Court stated that, in determining retroactivity, the Court "must take into account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial". 384 U.S. at 729, ***see also, Gosa v. Mayden, supra***. Looking at the other factors in place at the time of trial of these pre-***Batson*** cases, there is no unacceptable risk that a sentence of death has been inappropriately meted out in any case where peremptory excusal of blacks from the petit jury had occurred.

A prosecutor's peremptory strikes are not the only factor molding a capital sentencing jury. The defense counsel, who possesses at least an equal number and often a larger number of peremptory challenges[5], is also exercising strikes in a manner he perceives is calculated to bring about the seating of a jury sympathetic to his point of view. The Trial Court likewise constitutes a safeguard against an aberrant

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[5]Ky. Rule Crim. Proc. 9.36, 9.38, 9.40

jury verdict. The Court oversees the ***voir dire*** and may exercise, where appropriate, his authority to uncover bias among potential jurors. Prior to ***Turner v. Murray***, ___U.S.___, 106 S.Ct. 1683 (1986), the trial court had the duty in certain cases to allow ***voir dire*** into possible racial prejudice of the potential jurors, ***Ham v. South Carolina***, 409 U.S. 524 (1973) and always had the discretion to inquire into racial prejudice even absent a showing "that racial prejudice might infect [the] trial". ***Ristaino v. Ross***, 424 U.S. 589 (1976). The Court also exercises his supervisory authority during trial to ensure a fair trial. The sentencing hearing itself, while more subjective than a guilt determination, requires a jury[6] to consider a series of specific questions reaching their sentencing decision thus guiding the jury's discretion in non-racial channels. *See* ***Gregg v. Georgia***, 428 U.S. 153 (1976). ***Jurek v. Texas***, 428 U.S. 262 (1976). The Court's instructions to the jury in death sentencing procedures contain admonitions to the jurors with respect to the necessity to be impartial.

Finally, the majority of the States have by case law, court rule, or statute, mandated porportionality review of the sentences of death imposed by the trial courts. ***Pulley v. Harris***, 465 U.S. 37 (1984). These statutes generally specifically require that the case be reviewed by the Appellate Court

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[6]In some States, Judges, not juries make the final punishment determination in a capital case. Obviously capital sentences from these States cannot be deemed tainted by possible ***Batson*** error. Alabama, Ala. Code § 13A-5-45 (1982); Arizona, Ariz. Rev. Stat. Ann. § 13-703(B) (1985); Florida, Fla. Stat. § 921.141(3) (1970); Indiana, Ind. Code § 35-50-2-9(e) (1986 Cum. Supp.); Montana, Mont. Code Ann. § 46-18-30 (1985 Supp.); Nebraska, Neb. Rev. Stat. § 29-2520 (1985). In other States, the trial courts may set aside the jury's sentencing judgments. See, for instance, California, Cal. Penal Code § 190.4(e) (1977); Arkansas, Ark. Stat. Ann. § 43-2301 (Supp. 1973, Supp. 1975); Colorado, Colo. Rev. Stat. § 16-11-103(1)(a) (1985 Cum. Supp.); Virginia, Va. Code § 19.2-264.5 (1983).

to ensure that arbitiariness, passion, or prejudice did not play a role in the sentence of death.[7]

Porportionality review alone "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." ***Gregg v. Georgia***, 428 U.S. at 206; (Stewart J, plurality). Thus, the other safeguards in place during a sentencing hearing are sufficient to guard the integrity of the sentencing process in pre-***Batson*** capital cases.

The only basis for suggesting the capital sentencing had been impaired by pre-***Batson*** practices comes from the sociological studies cited by Griffith and his ***amici***. However, these studies are simply too old and too suspect due to methodology used to serve as a basis for this Court's determining ***Batson*** must be applied retroactively in the capital cases in the face of these other substantial safeguards which ensure reliable sentencing decisions. This Court, on at least two occasions, has allowed an execution to proceed despite the existence of a ***Batson*** claim made on collateral review. ***Larry Smith v. McCotter***, 86-1615, ___F.2d. ____ (5th Cir.

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[7]Ala. Code § 13A-5-53(b)(1) (1982); ***State v. Vickers***, 129 Ariz. 506, 633 P.2d 315 (1981); ***Collins v. State***, 261 Ark. 195, 548 S.W.2d 106 (1977); Colo. Rev. Stat. § 16-11-103(7)(b) (1985 Cum. Supp.); Conn. Gen. Stat. Ann. § 53a-46b(b) (1985); Del. Code Ann. 11 § 4209(g)(2)(a) (1979); Ga. Code Ann. § 17-10-35(c)(1) (1982); ***People v. Fetterly***, 710 P.2d 1202 (Idaho, 1985); Ill. Ann. Stat. 38 § 9-1(i) (Smith-Hurd 1986 Supp.); Ind. Code Ann. § 35-50-2-9(h) (Burns 1986 Cum. Supp.); Ky. Rev. Stat. § 532-075(3)(a) (1984); La. Code. Crim. Proc. Ann. § 905.9 (West 1984); Md. Code Ann. 27 § 414(e)(1) (1982); Miss. Code Ann. § 99-19-105(3)(a) (1985) Cum. Supp.); Mo. Ann. Stat. § 38-565.035(3)(1) (Vernon 1986 Cum. Supp.); Mont. Code Ann. § 46-18-310(1) (1985); Neb. Rev. Stat. § 29-2521.03 (1985); Nev. Rev. Stat. § 177.055(2)(c) (1985); N.H. Rev. Stat. Ann. § 630.5(vii)(9) (1983 Cum. Supp.); N.J. Rev. Stat. § 2c.11-3(e) (1986 Cum. Supp.); N.M. Stat. Ann. § 30-20A -4(c)(3) (1978); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Okla. Stat. Ann. 21 § 701.13(c)(1) (1983); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(i) (1982); S.C. Code Ann. § 16-3-25(c) (1976); Tenn. Code ann. § 39-2-205(c) (1982); ***State v. Wood***, 648 P.2d 71 (Utah, 1982); Va. Code § 17-110(c)(1) (1986 Cum. Supp.); Wyo. Stat. § 6-2-103(d) (1977).

1986), ***stay denied***, ____U.S. ____(August 21, 1986). ***Esquivel v. McCotter***, 791 F.2d 350 (5th Cir. 1986), ***cert. denied***, ____U.S. ____, 106 S.Ct. 2294 (1986). These cases alone indicate that this Court has already determined on collateral review what the States now claim - that ***Batson*** has no substantial influence on the truth finding function of a jury even in a capital proceeding. Thus, the first prong of the ***Stovall v. Denno*** test fully supports a prospective application of ***Batson***.

B. LAW ENFORCEMENT OFFICIALS JUSTIFIABLY RELIED ON THE OLD STANDARD IN *SWAIN*.

The second prong of the ***Stovall*** test requires the Court to consider the extent of the reliance by law enforcemnt authorities on the old standards. The ***amici*** States contend the reliance prong mandates prospective application of ***Batson***.

As the case law from all the Federal circuits and the State courts indicate, up until the day ***Batson*** was decided, the courts and prosecutors relied on the ***Swain*** standard. ***See, for instance United States v. Leslie, supra. See also Batson v. Kentucky, supra***, 106 S.Ct. at 1714-1715, n.1 (1986). "There is no question that prosecutors, trial judges, and appellate courts throughout our State and Federal systems justifiably have relied on the standard of ***Swain***." ***Allen v. Hardy***, 106 S.Ct. 2881. Such reliance by law enforcement on the ***Swain*** decision strongly supports the prospective application of ***Batson***.

Griffith and his amici suggest, however, the States are not entitled to reliance on past precedent since ***Swain*** was simply being used to cloak prosecutors' racist use of peremptory challenges - a practice forbidden under ***Strauder v. West Virginia***, 100 U.S. 303 (1880). Thus, opine Griffith's amici, prosecutors cynically used the exceedingly burdensome evidentiary standard suggested in Part III of ***Swain*** to insulate themselves from what they knew to be the improper use of peremptory strikes and should not be given the benefit of prospective application of ***Batson***.

As noted earlier, the almost universal interpretation of ***Swain v. Alabama*** was that a prosecutor could, without violating constitutional guarantees of the Equal Protection Clause, peremptorily excuse blacks in a particular case if the prosecutor felt on a case specific basis that a black juror would be unfavorable to the State. ***See, for instance McCray v. New York***, 461 U.S. 961, 964 (1983) (Marshall, J. dissenting). Thus, the fact that a prosecutor in a particular case may have used race as a basis for removing a juror from the petit jury where the prosecutor felt this was proper for the case's outcome does not show a disregard for the Constitution as interpreted by this Court in ***Swain*** any more than the defense lawyer who struck all whites in a case on the assumption whites would be more harsh on a black defendant showed a disrespect for the Constitution. Rather, it simply shows a reasonable reliance - now shown to be wrong - on the apparent holding of this Court and the lower Courts which have interpreted ***Swain***. The Griffith's amici's argument that prosecutors acted in bad faith, then, simply will not hold up to analysis.

Nor is a prosecutor's - or a lower court's - reliance on ***Swain*** unreasonable in the face of the expressions of discontent about ***Swain*** which began to appear with increasing frequency in the last ten years and in the face of the grand jury cases dealing with equal protection claims. The State and Federal Circuit Courts continued to reaffirm ***Swain's*** validity. This Court continued to deny certiorari in cases raising ***Swain*** as an issue. ***See, for instance, Gilliard v. Mississippi***, 464 U.S. 867 (1983) (denial of certiorari); ***Thompson v. United States, supra***, (denial of certiorari); ***McCray v. New York, supra***, (denial of certiorari). This Court continued to cite ***Swain*** with apparent approval, ***Regents of University of California v. Bakke***, 438 U.S. 265, 319, n.53 (1978) or distinguish ***Swain*** without suggesting its invalidity, ***Castaneda v. Partida***, 430 U.S. 482, 502, n.1 (1977) (Marshall, J. concurring).

The fact that ***Swain*** was much criticized in cases and by legal commentators cannot render law enforcement's reliance on ***Swain's*** apparent holding unreasonable. Prosecutors and State Court Judges ought not be charged with the duty to divine when prior precedent of this Court will be

changed simply on the basis of criticism of that prior precedent. The Blackstonian notion that "the duty of the Court was not to pronounce a new law, but to maintain and expound the old one", ***United States v. Johnson, supra***, 542, 1 W. Blackstone Commentaries 69 (15th ed. 1809), is equally applicable to the State's prosecutors and lower State and Federal courts.

The reliance on the ***Swain v. Alabama*** holding obviously has left the majority of prosecutors unprepared to defend their use of peremptory strikes under the ***Batson*** standards. What ***Swain*** apparently approved in Part II of the decision, ***Batson*** now deems unconstitutional. In face of the overwhelming case law and commentary supporting the view that ***Swain***, as a matter of substantive constitutional law allowed challenging blacks due to their race in a particular case if the challenge was related to a prosecutor's view of the outcome of the case, this Court should recognize that prosecutors and lower courts were acting in good faith in relying on ***Swain***. This Court should hold that this reliance mitigates against retroactive application of ***Batson***.

C. RETROACTIVE APPLICATION OF THE *BATSON* DECISION WOULD SERIOUSLY DISRUPT THE ADMINISTRATION OF JUSTICE.

The last prong of the three part ***Stovall*** test requires an analysis of "(c) the effect on the administration of justice of a retroactive application of the new standards." ***Stovall v. Denno***, 388 U.S. at 297. This criteria also requires a prospective application of ***Batson*** even as to cases now pending on direct appeal.

This Court has already recognized that "retroactive application of the ***Batson*** rule on collateral review of final convictions would seriously disrupt the administration of justice." ***Allen v. Hardy, supra***, 106 S.Ct. at 2881. While ***Allen v. Hardy*** has relieved the States from the obligation of litigating the use of challenges on collateral review, holding ***Batson*** retroactive for cases still pending on direct review will have a profound impact on the Court systems in the ***amici*** states. In ***Stovall*** the Court, in holding ***United States v.***

Wade, 388 U.S. 218 (1967) nonretroactive, relied on the fact that numerous hearings would have to be held "with problems of unavailability of witnesses and dim memories". 388 U.S. at 300. This concern is no less real in the present matter before the Court. The evidentiary standards for proving an equal protection violation in jury selection have been radically shifted. Cases in which the offers of proof were adequate to suffice as to a ***Swain*** claim are now clearly inadequate. ***See State v. Jackson***, ***supra***. Since it would appear that the proof of a prima facie case can be made even if all the jurors finally seated are not white, see ***Commonwealth v. Soares***, ***supra***, and since it appears that using the majority of the States' challenges in a case on black jurors alone raises a prima facie presumption of discrimination, ***Batson v. Kentucky***, the vast majority of cases now raising a ***Batson*** claim will have to be remanded to the trial courts for hearings. This will obviously engender a great deal of litigation in which ***voir dires*** will have to be re-constructed years after the fact and where the State will be required to "explain reasons for challenges, a task that would be impossible in virtually every case since the prosecutor, relying on ***Swain***, would have had no reason to think such an explanation would some day be necessary." ***Allen v. Hardy***, 106 S.Ct. at 2881. Even notes taken during ***voir dire*** to protect against such an eventuality could be insufficiently precise to meet the "clear and reasonably specific" requirement of ***Batson***. 106 S.Ct. at 1724, n.20. In the face of such specificity requirements, many deligent prosecutors will be unable to meet the burden required. This will necessitate new trials in many cases in which the evidence of guilt was overwhelming - a clearly unwarranted expenditure of precious judicial resources.

The ***amici*** for Griffith suggest there will be little impact on the administration of justice if the Court limits ***Batson's*** retroactivity to those cases presently pending on direct appeal due to the ability of the State to assert procedural bar if the issue has not been perfected on appeal. However, even if procedural bar can be successfully asserted, ***Reed v. Ross***, 468 U.S. 1 (1984), the determination of that issue will engender much litigation. Further, if this ruling was so foreseeable that procedural bar is appropriate, then litigation on the issue of ineffective assistance of counsel for failure to assert a ***Batson*** issue is clearly to be anticipated in

the States' courts. Thus, while the disruption of the system of justice is less due to the barring of the ***Batson*** issue on collateral review, the courts of the amici states will still be significantly burdened with hearings the prosecutors will be ill equipped to defend against if this Court gives ***Batson*** any retroactive application. The outcome of many of the hearings will be new trials simply because a prosecutor or trial judge did not anticipate correctly what type of record he had to make prior to the decision in ***Batson*** being announced.

Moreover, the procedure to be employed to determine a ***Batson*** violation is uniquely unsuited for retroactive application. The Court, modifying the test employed to prove purposeful discrimination in a grand jury selection or in Title VII case, stated:

> ...a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must first show that he is a member of a cognizable racial group...that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact...that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate ...Finally the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury...raises the necessary inference of purposeful discrimination...Once the defendant makes a prima facie showing the burden shifts to the State to come forward with a neutral explanation for challenging black jurors...the prosecutor's explanation need not rise to the level of justifying a challenge for cause...But the

> prosecutor may not rebut the defendant's prima facie case...by stating merely he challenged the jurors of the defendant's race on the assumption..that they would be partial to the defendant because of this shared race...The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established discrimination. 106 S.Ct. at 1722-1724.

This test puts much reliance on the credibility determinations of the trial court to make the determination about the prosecutor's motives in using his peremptory strikes.

Batson suggests a finding of purposeful discrimination by a trial judge would be a finding of fact entitled to great deference. ***Batson v. Kentucky***, 106 S.Ct. at 1724, n.21; ***See also Anderson v. Bessemer City***, 470 U.S. ____, 105 S.Ct. 1540 (1985). These credibility determinations in turn are to be gleaned from supervising ***voir dire*** (n.22), and by observing such things as the "pattern" of strikes against black jurors, or the prosecutor's questions and statements during the ***voir dire***. However, such credibility determinations, as this Court has recognized in reviewing challenges for cause under ***Witherspoon v. Illinois***, 391 U.S. 510 (1968) are difficult to make based on a cold transcript of a ***voir dire*** since the demeanor of the juror cannot be recorded.[8] Justice Powell, writing for the majority in ***Patton v. Yount***, noted "Demeanor plays a fundamental role not only in determining jury credibility, but also in simply understanding what a potential juror is saying...Demeanor, inflection, the flow of questions and answers can make confused and conflicting utterances comprehensible." Further, as stated in ***Reynolds v. United States***, 98 U.S. 145, 156-157 (1879), "the manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below but cannot always be spread upon the record." De-

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[8]***Darden v. Wainwright***, ____U.S.____, 106 S.Ct. 2464 (1986) ***Wainwright v. Witt***, 469 U.S. ____, 105 S.Ct. 844 (1985) ***Patton v. Yount***, 467 U.S. 1025 (1984).

meanor as much as the actual answers given is often the basis for a prosecutor's peremptory challenge decisions. Inflections in the voice of the juror and prosecutor, the physical appearance of the juror, the nonverbal interaction between the juror and others in the courtroom - the body language - simply cannot be adequately memorialized in the transcript, yet these nonverbal considerations are imperative for a fact finder to know in order to make a reliable credibility determination as to the reasonableness in assuming a prima facie case has been established or that the neutral reasons proffered by the prosecutor are reasonable and truthful. "Trial Courts face the difficult burden of assessing prosecutors' motives"; ***Batson v. Kentucky***, 106 S.Ct. at 1718, (Marshall, J. concurring). This Court ought not make this task more burdensome by requiring courts to attempt to reconstruct long finished ***voir dires***. Reading a ***voir dire*** transcript[9] and then listening to a prosecutor trying as much as two years after the fact to articulate "seat of the pants instincts", ***Batson***, 106 S.Ct. at 1745, (Rhenquiest, J. dissenting) simply will put the trial court in no better position than an appellate court in determining whether purposeful discrimination has been shown. As this Court has noted, "despite its importance, the adequacy of ***voir dire*** is not easily subject to appellate review..." ***Rosales - Lopez v. United States***, 451 U.S. 182, 188 (1981). "Conclusions as to impartiality and credibility" [must be reached]" by ... evaluations of demeanor evidence and of responses to questions..." ***Rosales-Lopez v. United States***, 451 U.S. at 188.

An attempt to make a determination of a ***Batson*** issue after the trial is over and the jury is dismissed will deprive the fact finder of the majority of the components he needs to make a reliable credibility decision. Such unreliability ought to militate against retroactive application of ***Batson*** since the administration of justice will be disrupted without gaining any truly reliable determinations of the existence of ***Batson*** violations.

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[9]A transcript of the ***voir dire*** may not even exist in many cases. ***See, for instance*** N.C. Gen. Stat. § 15A-1241(a)(1) (1983).

As shown, retroactive application of ***Batson*** will work a hardship on prosecutors and courts in reconstructing long finished ***voir dires*** and explaining prior actions. The retroactive application of ***Batson*** will also work a considerable hardship on another extremely important segment of the system - the victims and witnesses of the crimes.

This Court, in both ***Morris v. Slappy***, 461 U.S. 1 (1983) and ***United States v. Hastings***, 461 U.S. 499 (1983), recognized that the rights of victims and witnesses to be free of the renewed trauma of a retrial was an important consideration to weigh in determining when to use the Court's supervisory powers. As stated in ***Morris v. Slappy, supra***:

> ...in the administration of criminal justice, courts may not ignore the concerns of victims...this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience ...Precisely what weight should be given to the ordeal of reliving such an experience...need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources." 461 U.S. at 15.

In retroactivity decisions, since the Constitution neither requires nor prohibits retroactive application of a ruling, the Court must engage in a balancing of interests. In looking at the impact on the administration of justice component, this Court should give great weight to the impact of retroactive application of this case to the truly innocent persons in the justice system - the victims of the crime and their families and the witnesses who will once more have to interrupt their lives and try to recall events they would probably rather forget. Sparing the victims and witnesses the agony of retrial should be an important component of this Court's weighing the effect of ***Batson*** on the administration of justice, especially since, as argued earlier, the new

constitutional rule has only a minimal impact on the truth finding fuction of a trial. Analysis of the third consideration in the ***Stovall*** test, like the first two considerations, clearly supports a finding by this Court that ***Batson*** ought not be applied retroactively to cases on direct appeal.

CONCLUSION

For nearly twenty years the States followed what they reasonably believed to be the holding in ***Swain*** in using peremptory challenges during jury selection. Policy considerations require that the States' good faith reliance in ***Swain*** be accorded deference since a retroactive application of this case will require many retrials. Since ***Batson*** represents such a clear break from prior precedent and since the rule in ***Batson*** will have minimal effect on the truth finding process, the amici request that this Court not apply ***Batson*** retroactively to cases still pending on direct appeal.

Respectfully submitted,

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